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No. 99-116

In the Supreme Court of the United States

JEFFREY ALLAN FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a hospital that receives annual payments of between $10 and $15 million under the Medicare program is an "organization, government, or agency [that] receives * * * benefits in excess of $10,000 under a Federal program involving * * * Federal assistance" within the meaning of 18 U.S.C. 666(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 168 F.3d 1273.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1999. A petition for rehearing was denied on April 28, 1999. (Pet. App. 16-17). The petition for a writ of certiorari was filed on July 15, 1999, and was granted on November 1, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 666 of Title 18, United States Code, is reproduced in an Appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of fraud involving an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A) and 2 (count 1); one count of giving a kickback to an agent of an organization receiving federal funds, in violation of 18 U.S.C. 666(a)(2) and 2 (count 2); one count of mail fraud, in violation of 18 U.S.C. 1341 (count 3); two counts of wire fraud, in violation of 18 U.S.C. 1343 (counts 4-5); one count of conspiracy to commit the above offenses, in violation of 18 U.S.C. 371 (count 6); and seven counts of money laundering, in violation of 18 U.S.C. 1957 (counts 7-13). He was sentenced to 65 months' imprisonment, to be followed by three years of supervised release. He was ordered to pay $1.2 million in restitution. The court of appeals affirmed. Pet. App. A1-A15.

1. Title XVIII of the Social Security Act, 42 U.S.C. 1395-1395ccc (1994 & Supp. III 1997), establishes the federally funded Medicare Program to provide health insurance to the elderly and disabled.[1] A hospital participating under the Medicare program must meet specified conditions of participation and must file a provider agreement with the Secretary of Health and

[1] Part A of the program furnishes insurance that "provides basic protection against the costs of hospital, related post-hospital, home health services, and hospice care." 42 U.S.C. 1395c. Part B of the program is a voluntary insurance program covering physician charges and other medical services. 42 U.S.C. 1395k.

Human Services certifying that the hospital meets the statutory eligibility criteria. 42 U.S.C. 1395bb and 1395cc (1994 & Supp. III 1997); 42 C.F.R. Pts. 488-489. When hospitals provide eligible patients with covered services, the Secretary, through fiscal intermediaries acting as her agents, reimburses the hospital in accordance with the Medicare Act and the Secretary's regulations. 42 U.S.C. 1395f(b)(1), 1395h, 1395x(v)(1)(A) (1994 & Supp. III 1997); *Your Home Visiting Nurse Servs.* v. *Shalala*, 525 U.S. 449, 450-451 (1999).

Reimbursements to a hospital are made by periodic estimated payments and year-end reconciliation. Throughout the hospital's fiscal year, the fiscal intermediary makes advance payments to the hospital that reflect the hospital's estimated costs of anticipated services. 42 U.S.C. 1395g(a); 42 C.F.R. 413.60. At the end of the year, the fiscal intermediary makes whatever retroactive adjustments are appropriate to reconcile the total amount of interim payments paid to the hospital with the amount actually payable to the hospital under the program. 42 U.S.C. 1395x(v)(1)(A)(ii); 42 C.F.R. 413.64(e)-(f); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402 (1993). Each year, Medicare pays more than $100 billion to approximately 6000 hospitals that provide services under the program. Health Care Financing Administration, *1999 Data Compendium* 10, 77 (July 1999).

2. Petitioner was president and a partial owner of QMC, a private company that performed billing audits for health care providers. In 1993, he arranged for QMC to obtain a $1.2 million loan from West Volusia Hospital Authority (WVHA). WVHA is a county agency responsible for operating two hospitals. In 1993, WVHA received between $10 and $15 million in

payments under the Medicare program. Pet. App. 3a; J.A. 25, 26.

As security for the $1.2 million loan from WVHA, petitioner pledged QMC's accounts receivable and a $1 million letter of credit that QMC had obtained through a foreign bank, First Asia Development Bank. QMC's accounts receivable, however, had already been pledged to another QMC creditor, and the terms of the $1 million letter of credit severely limited WVHA's ability to collect on it. Petitioner negotiated the loan with WVHA's chief financial officer, Robert Caddick. Pet. App. 3.

Petitioner used the $1.2 million to repay creditors and to raise the salaries of QMC's five owner-employees, including petitioner. Petitioner also had QMC lend at least $100,000 to a company owned by the First Asia Development Bank representative who had assisted QMC with the $1 million letter of credit. In addition, petitioner used the loan proceeds by causing QMC to open options-trading accounts, which lost about $400,000. Pet. App. 4.

After the loan was made, QMC paid $10,000 to Caddick's mother, Stella Greenfield, by a check marked "consulting fees," even though Greenfield had never performed services for QMC. Greenfield later sent the check proceeds to Caddick. Petitioner noted on the check's invoice that the check was for a "loan origination fee." Pet. App. 5. Caddick later tried to cover up QMC's $10,000 payment to him by proposing to QMC's vice president, Charles Kramer, that he backdate a bogus "contract" for programming services that Caddick had allegedly performed for QMC. *Id.* at 6.

When QMC was unable to repay the loan on its due date, petitioner persuaded First Asia Development Bank to send QMC a $1.2 million draft, which QMC

endorsed and presented to WVHA. First Asia, however, refused to honor the draft when WVHA's bank presented it. Pet. App. 4-5. In December 1994, petitioner was removed from his position as president of QMC. The next month, QMC filed for bankruptcy. *Id.* at 6; Gov't C.A Br. 17.

3. The court of appeals affirmed petitioner's conviction. Pet. App. 1-15. The court of appeals rejected petitioner's contention that the government had failed to prove under 18 U.S.C. 666(b) that the organization affected by the petitioner's prohibited acts (WVHA) "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." The court of appeals explained that, under the plain terms of Section 666(b), "the 'benefits' an organization receives under a federal program can be in the form of 'a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.'" Pet. App. 11 (quoting 18 U.S.C. 666(b)). The court of appeals further explained that, in 1993, WVHA received between $10 and $15 million under the Medicare program for providing health care services to covered individuals. Pet. App. 11. The court concluded that, "[b]ecause WVHA received payments under a federal assistance program, WVHA received a type of 'benefits' expressly covered by § 666(b)." *Ibid.*

The court of appeals rejected the argument that the funds received by WVHA do not qualify as "benefits" because WVHA is not the "target recipient" of benefits under the Medicare program.[2] Pet. App. 12-15. The

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[2] The court of appeals observed that the record "did not clearly establish whether WVHA received funds directly from the

court explained that the statutory text "focuses on the source of 'benefits,'" requiring that they were received under a federal program involving federal assistance. *Id.* at 14. That language serves to distinguish payments made under an assistance program from payments made in "a purely commercial transaction," but, the court concluded, the statute does not contain any additional requirement that the recipient be a "target recipient." *Id.* at 15.

SUMMARY OF ARGUMENT

A. Section 666 covers acts of bribery involving agents of an "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a * * * a form of federal assistance." The jurisdictional reach of that provision extends to hospitals that receive more than $10,000 annually under the Medicare program. Medicare is a quintessential "federal assistance" program, and the funds it furnishes to hospitals qualify as "benefits." The term "benefits" under Section 666 includes the federal assistance payments made to fulfill the goals of the federal program; it excludes payments made as part of a purely commercial transaction. Hospitals directly receive substantial federal payments under Congress's program to provide assistance to elderly or disabled patients in need of medical care; the payments are not made in a purely commercial context.

The history of Section 666 confirms its applicability to hospitals that receive Medicare payments. The broad language of Section 666 was enacted to ensure

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Medicare program or received funds as an assignee" from a "target recipient," *i.e.*, a Medicare patient, but that Section 666(b) applied to hospitals whether or not the hospital received the payments directly or as an assignee. Pet. App. 14.

federal authority to prosecute acts of bribery involving agents of state and private entities that administered federal assistance programs; Congress intended to overcome limitations in prior law that left federal program funds unprotected in the hands of their recipients. The purpose of Section 666 also supports coverage of hospitals that receive Medicare funds. Section 666 is intended to protect the integrity of vast sums of federal assistance funds by ensuring the integrity of the agents of the organizations that receive them. The proper administration of the Medicare program requires that the hospitals that provide the covered medical care not be undermined by corrupt practices of agents, which could threaten the delivery of services or drive up their costs.

Petitioner erroneously contends (Br. 14-15) that hospitals do not receive "benefits" within the meaning of Section 666 because the beneficiaries of the Medicare program are patients, not hospitals. The focus of Section 666, however, is on the source and character of the payments made, not on whether the recipient is the intended ultimate beneficiary of the federal program. While the beneficiaries of most federal assistance programs are individuals, Section 666 applies when the recipient is an "organization, government, or an agency." Congress intended Section 666 to apply to federal funds paid to agencies and organizations under federal food stamp, disability, welfare, Medicaid, and housing programs even though the payments go to providers of assistance rather than the individuals sought to be assisted.

Petitioner's theory that service providers cannot receive "benefits" is also inconsistent with his concession (Br. 22-23) that Section 666 applies to fiscal intermediaries and other entities that administer or disburse

federal program funds. Like hospitals, those entities may provide services, and they are not the ultimate intended program beneficiaries. His theory of "benefits" is also in tension with the statute's coverage of benefits provided under a "contract" or "loan," which would normally entail a quid pro quo by the recipient. In any event, even if there were a requirement that hospitals themselves be "aided" by federal program funds in order to receive "benefits," there can no doubt that hospitals, which receive substantial guaranteed sources of revenues from the Medicare program, are themselves aided.

B. Petitioner's reliance on subsection (c) of Section 666 is misplaced. That Section states that "[t]his section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." That exemption was intended to apply only to the bribery and solicitation provisions of subsection (a), not to the jurisdictional provision of subsection (b). Medicare payments, in any event, could not be viewed as "expenses paid or reimursed" under subsection (c). The subsection, read as a whole, refers to compensation or expense payments to individuals, not organizations or governments. The origins of subsection (c) in a counterpart exemption from the bank-bribery statute confirm that it was intended to exempt certain payments to individuals, not the federal program payments that were the object of protection under Section 666.

C. The applicability of Section 666 to hospitals that receive Medicare payments is supported by this Court's precedents construing the reach of federal anti-discrimination laws based on the receipt of federal financial assistance. The Court has held that the actual recipients of the federal assistance funds are covered,

while entities that merely benefit incidentally are not. Accordingly, federal anti-discrimination laws have long been understood to apply to hospitals that receive Medicare funds. The parallel inquiry under Section 666 points to coverage of the same hospitals.

D. Finally, the application of Section 666 to hospitals that receive Medicare payments does not threaten principles of federalism or exceed Congress's power under the Spending Clause. Congress has a substantial interest in ensuring that its federal program funds are not dissipated or impaired by acts of fraud or corruption, and Section 666 applies only when an entity voluntarily accepts those funds. This case presents no issue of whether the statute requires any connection between the funds at issue and the criminal act, for petitioner has never raised any such claim. And, more importantly, petitioner's interpretation of the statute to exclude hospitals entirely, despite their receipt of billions of dollars under the Medicare program, would preclude the application of Section 666 even to criminal acts directed at the federal expenditures. That construction would frustrate the purpose of Section 666.

ARGUMENT

A HOSPITAL THAT RECEIVES IN EXCESS OF $10,000 IN MEDICARE PAYMENTS IS WITHIN THE JURISDICTIONAL COVERAGE OF SECTION 666

Section 666(a) makes it an offense, "if the circumstance described in subsection (b) of this section exists," for an agent of an organization, government, or agency to engage in certain acts of theft and fraud involving property valued at $5000 or more (18 U.S.C. 666(a)(1)(A)); for an agent of an organization, government, or agency to corruptly accept anything of value from any person intending to be influenced or rewarded

in connection with any transaction of the organization, government, or agency involving $5000 or more (18 U.S.C. 666(a)(1)(B)); or for any person to offer or give anything of value to any person intending to influence or reward an agent of an organization, government, or agency in connection with a transaction of such organization, government, or agency involving $5000 or more (18 U.S.C. 666(a)(2)). Section 666(b) provides that "[t]he circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b). The text, history, and purpose of the statute all support the conclusion that Section 666 applies to entities that receive federal assistance program payments, including Medicare payments to hospitals, because those payments constitute "benefits" "receive[d] * * * under a Federal program involving * * * Federal assistance."

A. Medicare Payments To Hospitals Are Benefits Under A Federal Assistance Program Within The Meaning Of Section 666(b)

1. *Medicare Payments To Hospitals Are Benefits*

a. There is no dispute in this case that WVHA is an "organization, government, or agency" that "receive[d], in any one year period," more than $10,000 in federal payments. Nor is there any dispute that the payments were received "under a Federal [assistance] program," the Medicare program. The central issue in this case is whether those payments qualify as "benefits" received by WVHA within the meaning of Section 666(b). The language and structure of Section 666 compel the conclusion that the payments made by the Medicare

program to hospitals that furnish services to covered patients are "benefits," as that term is used in Section 666.

The language of Section 666 is "expansive [and] unqualified * * *, both as to bribes forbidden and the entities covered." *Salinas* v. *United States*, 522 U.S. 52, 56 (1997). It broadly provides that Section 666 extends to organizations and agencies that receive "benefits * * * under a Federal program involving a * * * form of Federal assistance." In context, the term "benefits" in that provision includes payments under a federal assistance program. See *United States* v. *Rooney*, 986 F.2d 31, 34 (2d Cir. 1993) (Section 666(b) "expressly equates 'benefits' with 'Federal assistance.'"); see also *Webster's II New Riverside University Dictionary* 166 (1988) (defining "benefit" to include "[p]ayment[] made * * * in accord with a * * * public assistance program"); *The Random House Dictionary of the English Language* 194 (2d ed. 1987) (defining "benefit" to include "a payment * * * given by a * * * public agency"). Congress's intent to protect federal assistance funds in the hands of their recipients is further revealed by the title of Section 666—"Theft or bribery concerning programs receiving Federal *funds*." (emphasis added). See *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (title of statute relevant when discerning meaning of a statute); *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (same).

The focus of Section 666 on the federal-program source of the funds is underscored by its requirement that the "benefits" be received "*under* a Federal program *involving* a grant, contract, subsidy, loan, guarantee, insurance, or other form of *Federal assistance*." 18 U.S.C. 666(b) (emphasis supplied). The statute is

careful to limit its coverage to federal "program[s]" that provide "assistance." Thus, "the use of the term 'benefits' serves to emphasize * * * that the funds must have been received by the organization, government, or agency as part of an 'assistance' program, rather than a purely commercial transaction—the federal government's purchase of goods from a contractor, for example." Pet. App. 14-15.

The Medicare program directly makes payments to participating hospitals for providing covered services to eligible patients. 42 U.S.C. 1395f(a) (Part A); 42 U.S.C. 1395n(a) and 1395*l*(h)(5)(A) (Part B); 42 C.F.R. 424.51 ("Medicare pays the provider for services furnished by a provider.").[3] The federal government does not pay those funds, however, in order to purchase medical services in a commercial transaction. Rather, the government extends those funds under the Medicare program to provide federal assistance to elderly and disabled persons in need of medical care.[4] Because hospitals are

[3] Hospitals may charge patients, however, for deductibles and coinsurance. 42 U.S.C. 1395e (Part A); 42 U.S.C. 1395n(c) (Part B); 42 C.F.R. Pt. 489, subpt. C.

[4] As the Secretary has explained in a related context, hospitals that provide Medicare services do so based on their receipt of federal assistance and not as part of a purely commercial transaction with the government:

> [U]nder Medicare and Medicaid the level of services is determined by providers who are * * *—with Federal assistance—engaging in activities they have long performed. In this respect Medicare and Medicaid payments are indistinguishable from grants to pay the costs of medical services. Indeed, [Medicare] payments often cover medical costs of indigent patients that hospitals would otherwise be required to absorb pursuant to their other legal obligations. In contrast, under a procurement contract the government acts on its own account as a consumer of goods, such as typewriters and paper clips, or services, such as hotel accommodations and rental car services for traveling employees. The level of services under procurement contracts is determined by the government and not, as under Medicaid or Medicare, by the provider.

49 Fed. Reg. 1640 (1984) (concluding that hospitals are covered by Section 504 of the Rehabilitation Act when they provide federally assisted medical services, see pp. 28-30, *supra*).

the actual and direct recipients of Medicare funds, and Medicare is a federal assistance programs, hospitals receive "benefits * * * under a Federal program * * * involving Federal assistance" within the meaning of Section 666(b).

b. The history and purpose of Section 666 also support a broad reading of its jurisdictional scope. The history demonstrates that Congress intended Section 666 to cover entities receiving funds under a federal assistance program. The Senate Judiciary Report accompanying Section 666 stated that the statute "is designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program." S. Rep. No. 225, 98th Cong., 1st Sess. 369 (1983). The Report observed that 18 U.S.C. 665 makes "theft or embezzlement by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a Federal offense," but "there is no statute of general applicability in this area." S. Rep. No. 225, *supra*, at 369. The Committee further noted that the general theft of federal property statute, 18 U.S.C. 641, was inadequate to protect against theft from entities receiving federal assistance funds. S. Rep. No. 225, *supra*, at 369. The Committee explained that, "[i]n

many cases * * * title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown," giving "rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds." *Ibid.*

With respect to the types of entities protected by the statute, the Senate Report expressed Congress's intent that "the term 'Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance' *be construed broadly*, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs." S. Rep. No. 225, *supra*, at 370 (emphasis added). The one limitation that Congress envisioned supports the proposition that the statute covers recipients of federal assistance payments. As Congress explained:

> The concept [of "Federal program"] is not unlimited. The term * * * means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5000 or more from the supplier a Federal crime. It is, however, the intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases.

S. Rep. No. 225, *supra*, at 370. Each of the cases cited by the Committee involved bribery of an official or an agent of an entity that received federal funds under an assistance program. See *United States* v. *Hinton*, 683 F.2d 195, 198-200 (7th Cir. 1982) (bribery involving officials of non-profit entity which administered HUD community development grant funds), aff'd *sub nom. Dixson* v. *United States*, 465 U.S. 482 (1984); *United States* v. *Mosley*, 659 F.2d 812, 815-816 (7th Cir. 1981) (bribery involving official of state agency responsible for administering CETA program); *United States* v. *Del Toro*, 513 F.2d 656, 662-663 (2d Cir.) (bribery involving official of Model Cities Program funded by HUD), cert. denied, 423 U.S. 826 (1975).[5]

The application of Section 666 to hospitals receiving Medicare payments also furthers the statute's purpose "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S. Rep. No. 225, *supra*, at 370; see also *United States* v. *Marmolejo*, 89 F.3d 1185, 1193 (1996) (Section 666 "ensure[s] the integrity of federal funds by protecting the integrity of the organizations that receive them."), aff'd *sub nom. Salinas* v. *United States*, 522 U.S. 52 (1997).

That principle is illustrated by this case. Petitioner's conduct in obtaining a loan from WVHA, a Medicare provider, by fraud and giving a kickback to WVHA's chief financial officer threatened the integrity of the

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[5] The Senate Report also explained that Section 666 was intended in part to resolve the disagreement reflected in those cases as to whether 18 U.S.C. 201, which prohibits bribery of a "public official," applied to "a person employed by a private organization receiving Federal monies pursuant to a program." S. Rep. No. 225, *supra*, at 369; see also *Salinas*, 522 U.S. at 58-59.

Medicare program in which WVHA participated. The sound administration of the program relies on officials at participating hospitals who will not be swayed by improper influences that interfere with providing medical care to patients or that drive up the costs of the program. See, *e.g.*, 42 U.S.C. 1395f(a), 1395y(a) (1994 & Supp. III 1997) (Medicare program pays for only reasonable and medically necessary services). Thus, the "determination that WVHA is an agency receiving 'benefits' within the meaning of § 666(b) serves the statute's purpose of protecting from fraud, theft, and undue influence by bribery the money distributed to health care providers, and WVHA in particular, through the federal Medicare program and other similar federal assistance programs." Pet. App. 11-12; see also *Salinas*, 522 U.S. at 61 (acceptance of bribes by official of a jail housing federal prisoners under an agreement with the federal government "was a threat to the integrity and proper operation of the federal program").

2. ***Hospitals Are Not Exempt From Receiving Benefits Because They Are Not The Intended Beneficiaries Of The Medicare Program But Are Reimbursed For Providing Services***

Petitioner and his amicus contend (Br. 14-18; NACDL Amicus Br. 10-14) that WVHA did not receive "benefits" within the meaning of Section 666(b), because the only recipients of benefits under the Medicare Act are the "individual patient[s]" who receive medical services. See, *e.g.*, Pet. Br. 15 ("The party that receives the benefits of that federal program is—and remains at all times—the individual patient."); Pet. Br. 25 ("the entity that receives federal assistance under the federal Medicare program is the individual patient"). Petitioner notes (Br. 16-17) that the Medicare Act itself specifies that individuals are entitled to receive hospital insurance "benefits" in the form of payments to hospitals on the individual's behalf when the hospitals provide covered services. See 42 U.S.C. 1395d(a) (1994 & Supp. III 1997) ("The benefits provided to an individual by the insurance program under this part shall consist of entitlement to have payment made on his behalf."). That definition, however, does not help petitioner, because it explicitly recognizes that the payments made to hospitals providing services under Medicare *are* the "benefits" furnished under the program. See also 42 C.F.R. 400.202 ("*[h]ospital insurance benefits* means payments [to providers] on behalf of * * * an entitled individual for services that are covered").[6]

It also is implausible to suggest that Congress intended to limit the coverage of Section 666 to only those entities that receive federal money as the intended program beneficiaries. A recipient of "benefits" under Section 666 is an "organization, government, or an agency." Those entities frequently are not the intended beneficiary of a federal assistance program but they nonetheless receive federal assistance funds on behalf of the program beneficiaries. For instance, Congress extends food stamp, disability, welfare, Medicaid, and housing assistance to needy individuals

[6] Amicus NACDL acknowledges (Br. 10) that "funds disbursed through the Medicare program are 'benefits'" when received by patients, but argues that they are not when received by the hospital. The statute does not adopt the perspective of the recipient, however, with the result that whether payments are deemed "benefits" depends on who is receiving the federal funds (and why they are being received). Rather, it designates funds as "benefits" when they are received under a "Federal program" involving "Federal assistance."

by providing program funds to agencies and organizations that in turn provide assistance to program beneficiaries.[7] Congress presumably acted with full knowledge of those programs when it drafted Section 666(b) broadly to protect substantial federal assistance payments, whether or not the recipient entity is the beneficiary of the program or provides assistance to the individuals sought to be assisted by the program. See *United States* v. *Zyskind*, 118 F.3d 113, 116 (2d Cir. 1997) ("Nothing in the language of § 666 suggests that its reach is limited to organizations that were the direct beneficiaries of federal funds. The jurisdictional subsection, (b), uses the word 'receives,' rather than the phrase 'is a beneficiary of.'").

Tellingly, not even petitioner argues that the recipients of "benefits" under Section 666(b) are limited to program beneficiaries. Petitioner does not dispute (Br. 22-23) that Section 666 applies to fiscal intermediaries and other entities that administer or disburse funds under a federal program. Such entities, of course, are not the beneficiaries of an assistance program. A hospital providing medical assistance with federal funds intended for that purpose is no different from a fiscal intermediary for purposes of Section 666.

Petitioner similarly argues (Br. 17, 24) that Medicare payments to hospitals are not "benefits" because hospitals are reimbursed for services performed. See also NACDL Amicus Br. 14 (hospitals "do not * * * get aid, they get *paid*"). That misses the point, because the payments at issue are not simply commercial transac-

[7] 7 U.S.C. 2020 (1994 & Supp. IV 1998) (food stamps); 42 U.S.C. 421 (social security disability program); 42 U.S.C. 601 *et seq.* (welfare); 42 U.S.C. 1396 *et seq.* (Medicaid); 42 U.S.C. 1437 *et seq.* (housing); 42 U.S.C. 5301 *et seq.* (community development).

tions, see pp. 12-13, *supra*, but are assistance funds. "The inquiry is not whether there is a *quid pro quo*, but, rather, whether the funds disbursed can be considered Federal assistance within a specific statutory scheme intended to promote public policy objectives and not payments by the government as a commercial entity." *Rooney*, 986 F.2d at 35. The fact that hospitals are paid or reimbursed in exchange for providing Medicare-covered services does not mean that the payments are not made under a federal assistance program.

The statutory language itself provides that benefits can be in the form of "a *grant*, *contract*, *subsidy*, *loan*, *guarantee*, *insurance*, or other form of Federal assistance." 18 U.S.C. 666(b) (emphasis added). "A straightforward reading of this text indicates that § 666(b) encompasses many situations in which the government receives consideration in return for federal assistance." *United States* v. *Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998). Congress's inclusion of the words "contract" and "loan" are the most obvious indications that Congress contemplated that the government could receive consideration or a quid pro quo in return for extending funds under a federal assistance program. "As a party to a contract, the federal government presumably gets something in return for its consideration, and a loan is not typically a gift or charitable contribution." *United States* v. *Nichols*, 40 F.3d 999, 1000 (9th Cir. 1994) (per curiam); see, *e.g.*, *United States* v. *Marmolejo*, 89 F.3d 1185, 1190-1191 (5th Cir. 1996) (statute applied to agency operating jail housing federal prisoners under contact with federal government), aff'd on other grounds *sub nom. Salinas* v. *United States*, 522 U.S. 52 (1997); *Rooney*, 986 F.2d at 34 (government-sponsored

loan qualified as a benefit even though recipient was required to repay entire loan with interest).[8]

Petitioner further argues (Br. 22-24) that Section 666(b) does not apply to hospitals that receive Medicare payments because hospitals do not administer a federal program like the entities in *Del Toro*, *Hinton*, and *Mosley* or otherwise disburse federal funds to an intended beneficiary. The statute's text, however, imposes no such requirement. The statute applies to any entity that "receives * * * benefits * * * under a Federal [assistance] program"; it draws no distinction between entities that receive federal assistance payments as program beneficiary or administrator and entities that receive federal assistance payments as provider of medical services or other assistance to program beneficiaries.[9]

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[8] Petitioner's construction also conflicts with Congress's intent that Section 666 protect the federal assistance programs at issue in *Hinton*, *Mosley*, and *Del Toro*. See pp. 14-15, *supra*. In each of those instances, "the organization or city agency provided the Federal government with a service by administering a government program." *Rooney*, 986 F.2d at 35; accord *United States* v. *Marmolejo*, 89 F.3d at 1194 n.11. Yet petitioner concedes the coverage of such entities. Pet. Br. 22-23.

[9] Petitioner remarkably asserts (Br. 23-24) that "[n]o federal monies were ever distributed to WVHA" and that WVHA "does not receive any funding from the federal government for its operational expenses." Petitioner elsewhere in his brief (Br. 19-20) acknowledges that Medicare pays hospitals for the costs and expenses of providing covered services. Indeed, Medicare in 1993 paid WVHA $10 to $15 million, a portion of which was based on fixed rates of pay for WVHA's operating costs of providing inpatient hospital care to Medicare patients. J.A. 27-28; see also 42 U.S.C. 1395ww(d) (1994 & Supp. III 1997) (prospective payment system).

In any event, there is no principled reason to distinguish between the services provided by the entities at issue in *Del Toro*, *Hinton*, and *Mosley* and the services provided by hospitals participating under the Medicare program. In both instances, the services are funded by the federal program and provided in furtherance of a federal mission. And the threat to the federal program is the same whether the recipient affected by corrupion administers federal funds or delivers medical serices with federal assistance funds. Corruption affecting both types of recipients threatens their stability and impairs their capacity to provide the level and quality of assistance envisioned by the federal program and thereby adversely affects federal funds furnished by the program.[10]

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[10] Contrary to the suggestion of petitioner's amicus (NACDL Br. 17-18), this case does not present a case of "guesswork reaching out for lenity." *United States* v. *Wells*, 519 U.S. 482, 499 (1997). "The rule of lenity * * * applies only when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States* v. *Shabani*, 513 U.S. 10, 17 (1994). Here, both the text and history of Section 666 support the treatment of Medicare payments to hospitals as benefits received under a federal assistance program. By contrast, petitioner construes the statute to protect only federal assistance payments that do not reflect any element of compensation or reimbursement. At the same time, however, petitioner acknowledges that the statute extends to federal funds that are administered by recipients that are not the intended beneficiaries and that are compensated for their services. Because that interpretation has no textual support or logical coherence, the rule of lenity has no application. See *Salinas*, 522 U.S. at 66 (the "rule does not apply * * * when invoked to engraft an illogical requirement to its text").

3. *Hospitals Are Aided By Medicare Funds*

To the extent that Section 666(b) is read (wrongly, we believe) to apply only to those recipients of federal assistance funds that are themselves aided by the funds, hospitals participating under Medicare meet that requirement as well. The Medicare program provides a guaranteed source of revenue to hospitals that provide medical services to individuals who might not otherwise seek or be able to afford medical care. See 49 Fed. Reg. at 1639 ("The Medicare and Medicaid programs were established for the purpose of providing medical services to people who otherwise might not be financially able to obtain them."); see also Medicare Payment Advisory Comm'n, *Report to the Congress: Medicare Payment Policy* 61 (Mar. 1999) (prospective payment rate adjustment under 42 U.S.C. 1395ww(d)(5)(F) for hospitals serving a large number of indigent patients "protect[s] access to care for Medicare and low-income populations *by assisting the hospitals they use*") (emphasis added).

That source of revenue is significant. In 1997 alone, the Medicare program paid more than $100 billion to hospitals. *1999 Data Compendium*, *supra*, at 10. As the American Hospital Association, "the primary organization of hospitals in the United States," recently explained to this Court, "Medicare payments for services rendered to beneficiaries account for approximately forty percent of the revenue of the average member hospital. Hospitals * * * rely on Medicare as a major source of revenue to assure their financial survival." Brief of Amici Curiae The American Hospital Association and the Federation of American Health Systems at 1, *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999) (No. 97-1489); see also Pet. App. 7

(testimony by WVHA's director of finance that "most health care organizations collect a majority of their funds from programs that are funded by the federal government").[11] Thus, hospitals receive enormous financial advantages from their participation in the Medicare program.

B. Section 666(c) Does Not Exempt Medicare Payments To Hospitals From The Statute's Jurisdictional Coverage

Petitioner also relies on (Br. 19-21) Section 666(c), which provides that "[t]his section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." 18 U.S.C. 666(c). He argues (Br. 21) that, read "in conjunction," subsections (b) and (c) "clearly contemplate a distinction between benefits and payments." Subsection (c), however, does not exempt from the statute Medicare payments that reimburse hospitals for their costs and expenses of providing covered services, and it does not alter the character of such payments as "benefits" within the meaning of subsection (b).

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[11] The American Hospital Association similarly acknowledged, at the inception of the program, that Medicare provides financial assistance to hospitals:

> The enactment of Public Law 89-97 (Social Security Amendments of 1965), commonly called Medicare, will be a great boon to hospitals financially. Both hospitals and the medical profession have given thousands of hours of free care every year since the profession and hospitals took root in this country. Medicare will lift this enormous financial burden from hospitals and enable them to improve their facilities, broaden their services, train their personnel on a continuing basis, and take other steps to continue the improvement of patient care.

Edwin L. Crosby, M.D., Director and Executive Vice President of the Am. Hosp. Ass'n, *The Atlantic Monthly* 106 (July 1966).

1. The role of subsection (c) in Section 666 is to limit the substantive scope of the criminal conduct prohibited by Section 666—bribery under 18 U.S.C. 666(a)(2) and solicitation under 18 U.S.C. 666(a)(1)(B)—clarifying that bona fide salary (or other compensation or expenses reimbursed) cannot be characterized as an improper transaction. Subsection (c) thus "ensure[s] that the statute is not applied to 'acceptable commercial and business practices'"; the subsection has no application "to the nature of the benefit that the agency receives pursuant to the Federal program." *Marmolejo*, 89 F.3d at 1190 n.5 (quoting H.R. Rep. No. 797, 99th Cong., 2d Sess. 30 (1986)).

Petitioner isolates the phrase "expenses paid or reimbursed" in arguing that Medicare payments received by hospitals are exempt from statutory coverage. This Court has repeatedly emphasized, however, that the meaning of statutory language "cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993); see also *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 460 n.5 (1998) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). The phrase "expenses paid or reimbursed" in subsection (c) is surrounded by the statutory terms "bona fide" and "in the ususal course of business." Those terms reveal Congress's intention to ensure the statute does not criminalize legitimate, routine business transactions involving individuals. The adjective "bona fide" means "[p]erformed or made in good faith," *Webster's II New Riverside University Dictionary* 188 (1988), and it naturally describes a payment that is not a sham transaction masquerading a kickback. By contrast, "bona fide"

would be a meaningless way to limit the type of qualifying federal financial assistance under Section 666(b), for all such assistance is "bona fide." Similarly, the phrase "usual course of business" would be awkward language for Congress to use to restrict the types of federal assistance programs protected by the statute, for any government extension of funds under such programs is within the usual course of the *government's* business. The phrase "expenses paid or reimbursed," taken in context, thus does not refer to payments made under a federal assistance program within the meaning of Section 666(b).

Other words surrounding the phrase "expenses paid or reimbursed" similarly indicate that Congress intended Section 666(c) to limit the types of payments covered under Section 666(a), not the jurisdictional provision of Section 666(b). The payments described under Section 666(c) are "*salary*, *wages*, fees, and other compensation paid, or expenses paid or reimbursed." 18 U.S.C. 666(c) (emphasis added). The words "salary" and "wages" connote payments to *individuals*, not payments to an "organization, government, or agency" that is the recipient of financial assistance under Section 666(b). Under the well-established principles of *ejusdem generis* and *noscitur a sociis*, the catch-all description of "other compensation paid, or expenses paid or reimbursed" similarly refers to payments to individuals under Section 666(a), not payments to entities under Section 666(b). See *Brogan* v. *United States*, 522 U.S. 398, 403 n.2 (1998) ("Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."); *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps

(the doctrine of *noscitur a sociis*). This rule * * * avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'") (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Thus, by providing that "[t]his section shall not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business," Congress meant to ensure that individuals who receive legitimate compensation payments would not be subject to the statute's criminal prohibitions.

2. Petitioner's reliance on Section 666(c) also fails because it violates "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Department of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (internal quotation marks omitted); accord *Kawaauhau* v. *Geiger*, 523 U.S. 57, 61 (1998). To exclude from statutory coverage any federal payment reflecting the economic relationship of "compensation paid, or expenses paid or reimbursed" would render the words "contract" and "loan" in Section 666(b) meaningless, as those forms of federal assistance by their nature include an element of compensation or quid pro quo for the federal funds. See p. 19, *supra*. As the Ninth Circuit has explained, "to extrapolate from [the language of Section 666(c)] a rule that the statute covers only agencies that receive gifts or charitable contributions from the federal government, and excludes all agencies that provide the federal government with some form of quid pro quo" would "not square with the remainder of § 666, which expressly *does* cover organizations receiving 'benefits . . . under a Federal program involving a . . . contract . . . [or] loan'." *Nichols*, 40 F.3d at 1000.

This Court also should reject petitioner's interpretation of Section 666(c) because it would exempt from the statute's protection federal assistance programs in which federal funds are used to compensate the recipient agency or entity for administering a federal program, including those programs involved in *Hinton*, *Mosley*, and *Del Toro*. See *Salinas*, 522 U.S. at 58 (declining to apply Section 666 inconsistently with Congress's intent to reach the situations at issue in *Del Toro*, *Mosley*, and *Hinton*). In each of those decisions, the federal assistance program at issue paid the entity for its costs and expenses. See *Hinton*, 683 F.2d at 198-200 (Community Development Block Grant program paid organization's costs and employees' salaries); *Mosley*, 659 F.2d at 815-816 (CETA program paid agency's costs and employee salaries); *Del Toro*, 513 F.2d at 661-662 (Model Cities Program paid 100% of agency's costs and 80% of its employees' salaries).

3. The history of Section 666(c) confirms Congress's intention to limit the statute's criminal prohibitions, not its jurisdictional scope. When Congress in 1986 added the current version of Section 666(c), Pub. L. No. 99-646, § 59(a), 100 Stat. 3612, the House Report explained that it was amending the statute "to avoid its possible application to acceptable commercial and business practices." H.R. Rep. No. 797, 99th Cong., 2d Sess. 30 (1986). The House Report explained that (*id.* at 30 n.9):

> [Section 666] prohibits bribery of certain public officials, but does not seek to constrain lawful commercial business transactions. Thus, 18 U.S.C. 666 prohibits corruptly giving or receiving anything of value for the purpose of influencing or being influenced in connection with any business, transaction, or series of transactions. The provision

parallels the bank bribery provision (18 U.S.C. 215). *See* Pub. L. No. 99-370, 99 Stat. ___ (1986). *See also* H.R. Rep. No. 335, 99th Cong., 1st Sess. 1985.

Those statements reflect a congressional intent to ensure that good faith or legitimate payments to individuals are not punished as bribery.

The Report's reference to the parallel bank bribery provision also is significant. Congress earlier had amended the bank bribery provision in 18 U.S.C. 215 to include a subsection (c) that contains language identical to that in Section 666(c). Bank Bribery Amendments Act of 1985, Pub. L. No. 99-370, § 2, 100 Stat. 779. The history of Section 215(c) demonstrates that the statutory language was intended to immunize legitimate business payments to employees from criminal punishment. See H.R. Rep. No. 335, 99th Cong., 1st Sess. 1, 7 (1985) (purpose of Section 215(c) was to define "the prohibited conduct" and to exempt from criminal punishment a "bonus paid an employee or the payment or reimbursement of business expenses incurred by the employee" or when "employees of credit unions receive their salaries directly from the company with which the credit union is connected"). The origins of Section 666(c) thus support the conclusion that the provision limits the bribery and solicitation of bribery offenses set forth in Section 666, and not the types of federal programs protected by the statute.

C. The Coverage Of Hospitals Under Section 666 Is Consistent With This Court's Precedents Construing Federal Anti-Discrimination Statutes

Treating hospitals as recipients of benefits under a federal assistance program for purposes of Section 666 accords with decisions of this Court that have construed similarly worded statutes that prohibit discrimination

under programs or activities "receiving Federal financial assistance." 20 U.S.C. 1681(a) (Title IX); 29 U.S.C. 794 (Section 504 of Rehabilitation Act); 42 U.S.C. 2000d (Title VI). This Court has construed that language to require courts "to identify the recipient of federal financial assistance," *i.e.*, the entity that enters into an "agreement to accept the federal funds," and "actually 'receive[s]'" or is "intended to receive the federal money." *United States Dep't of Transp.* v. *Paralyzed Veterans of America*, 477 U.S. 597, 605, 606 (1986); *Grove City College* v. *Bell*, 465 U.S. 555, 564-570 (1984) (schools that participate in student loan programs are recipients of federal funds under Title IX, whether the school directly receives federal funds or students receive the funds earmarked for educational purposes).

Petitioner agrees that determining the scope of the civil rights statutes presents an "analogous question," but he contends (Br. 24-25) that hospitals profit only indirectly from Medicare payments. Petitioner relies (Br. 25) on the principle that the coverage of the anti-discrimination statutes does not follow federal funds "past the recipient to those who merely benefit" from the funds. *Paralyzed Veterans of America*, 477 U.S. at 607; *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 468 (1999) ("[e]ntities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not").

Hospitals receiving Medicare payments, however, are actual recipients of federal payments, not mere indirect beneficiaries from assistance to other parties. Hospitals enter into provider agreements with the Secretary for the very purpose of obtaining federal payments under Medicare, 42 U.S.C. 1395cc, and

hospitals are the direct, actual, and intended recipients of assistance funds under Medicare. As this Court has noted, the "key is to identify the recipient"; if the program "extends money, then the recipient * * * is the entity that receives the money." *Paralyzed Veterans of America*, 477 U.S. at 607 & n.11; see also *id.* at 606 (rejecting argument that "confuses intended *beneficiaries* with intended *recipients*"). It therefore has been the Secretary's long-standing view that hospitals reimbursed under the Medicare program are recipients of "Federal financial assistance" under Title VI and Section 504 of the Rehabilitation Act. 38 Fed. Reg. 17,978-17,984 (1973); 49 Fed. Reg. at 1639; see also *United States* v. *Baylor Univ. Med. Ctr.*, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985). Accordingly, hospitals participating in the Medicare program must agree to comply with the anti-discrimination statutes applicable to recipients of federal financial assistance. 42 C.F.R. 489.10(b). The well-established treatment of hospitals as recipients of "Federal financial assistance" under anti-discrimination laws thus strongly supports the conclusion that hospitals paid by Medicare are the recipients of "benefits * * * under a Federal [assistance] program."

D. The Application Of Section 666 To Criminal Acts Involving Hospitals That Receive Medicare Payments Is Consistent With Principles Of Federalism

Petitioner finally argues (Br. 26) the application of Section 666 to payments for "services provided under a federal program * * * would, in effect, lead to virtually limitless federal liability" and offend principles of federalism that recognize the States' primary responsibility for enforcing the criminal laws. Petitioner's amicus similarly contends (NACDL Amicus Br. 29) that

Congress lacks power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to apply Section 666 to prohibit bribery involving "*any* organization that in *any* way receives in a year more than $10,000 from *any source* so long as those funds had at *any* point passed through the bailiwick of a federal program."

This case, however, presents no issue of federalism. Hospitals participating under Medicare receive payments directly under the program. 42 U.S.C. 1395f, 1395g, 1395n. And they receive those payments only as a result of their voluntary choice to participate in the program. 42 U.S.C. 1395cc. Cf. *Paralyzed Veterans of America*, 477 U.S. at 606 ("By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds.").[12] And, "[a]lthough the

[12] Petitioner and his amicus argue (Pet. Br. 17-18; NACDL Amicus Br. 3, 11-12 & n.12) that interpreting the term "benefits" to include payments under federal assistance programs would support extending Section 666 to educational institutions that receive tuition payments funded by federally guaranteed loans and grocery stores that receive food stamps from customers, which petitioner contends (Br. 17) would entail "a virtually limitless reach of Congress's authority under the Spending Power." Assuming that Section 666 would reach those distinct statutory programs, it would not exceed Congress's power. Grocery stores and schools voluntarily choose to participate in a federal assistance program in order to receive federal money. See 7 U.S.C. 2018 (1994 & Supp. IV 1998) (food stamp program); 20 U.S.C. 1094(a) (student loan program). And the government has an interest in ensuring the integrity of program funds extended to those institutions. See, *e.g.*, 7 U.S.C. 2018(a)(1) (Supp. IV 1998) ("business integrity and reputation of the applicant" relevant in determining eligibility to accept and redeem food stamp coupons); 20 U.S.C. 1094(a)(1) and (3) (requiring school to "use funds received * * * and any interest or other earnings thereon solely for the purpose specified in and in

extent of the federal government's assistance programs will bring many organizations and agencies within the statute's scope, the statute limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions." *United States* v. *Westmoreland*, 841 F.2d 572, 577 (5th Cir.), cert. denied, 488 U.S. 820 (1988). In those circumstances, the application of Section 666 to proscribe significant acts of theft, fraud, or bribery involving hospitals receiving Medicare payments does not approach (let alone exceed) the limits of Congress's power. See *Salinas*, 522 U.S. at 61 (application of statute to official who accepted bribes in connection with prisoner held in a jail paid for in significant part by federal funds did not "extend federal power beyond its proper bounds"); see also *Westfall* v. *United States*, 274 U.S. 256, 258-259 (1927) (Holmes, J.) (upholding constitutionality of statute criminalizing misapplication of funds of state banks belonging to Federal Reserve System).

This case does not present the question whether federal funds must be linked to the conduct prohibited by Section 666. In *Salinas*, this Court rejected the contention that Section 666 requires the bribe to affect federal funds, but it reserved the question "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds." 522 U.S. at 59. Petitioner has never argued in this case that there was not a sufficient connection between his giving a kickback to WVHA's chief financial officer for a loan

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accordance with" student loan program and to "maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students" under program).

and WVHA's receipt of Medicare funds. In any event, under petitioner's construction of the word "benefits," Section 666 would not apply even to those acts of fraud, bribery, or theft by a hospital official that directly affected Medicare funds. See, *e.g.*, *United States* v. *LaHue*, 170 F.3d 1026 (10th Cir. 1999) (Pet. App. 18a-32a) (physicians who received bribes from hospitals in return for referring Medicare patients to hospitals). That construction would defeat the federal government's strong interest in protecting the integrity of entities that receive large amounts of federal assistance payments, while failing to achieve any interest in preserving the proper federal-state balance.[13]

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[13] Petitioner concludes by asserting (Br. 27) that a reversal of his Section 666 convictions would entitle him to a reversal of his count of conviction for conspiracy and to a remand with respect to his mail and wire fraud counts of conviction. Petitioner has waived those contentions, however, by raising them for the first time in his merits brief before this Court. See S. Ct. Rules 14.1(a) and 24.1(a). In any event, those arguments lack merit. Petitioner asserts no basis for reversal of his mail and wire fraud convictions, and the mail and wire fraud offenses were charged as objects of the conspiracy. J.A. 15. In those circumstances, no rational jury could have found that the government failed to establish either of those two valid objects of the conspiracy. See, *e.g.*, *United States* v. *Zvi*, 168 F.3d 49, 55 (2d Cir.), cert. denied, 120 S. Ct. 176 (1999). Thus, as petitioner conceded before the district court in seeking bond pending this Court's review, if petitioner is successful in obtaining a reversal of his Section 666 convictions, "he will still be convicted under Count Three, Mail Fraud, 18 U.S.C. § 1341; Counts Four and Five, Wire Fraud, 18 U.S.C. § 1343; and Count Six, Conspiracy 18 U.S.C. § 371." 11/5/99 Motion and Memorandum 5.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 666 of Title 18, U.S. Code, provides:

§ 666. Theft or bribery concerning programs receiving Federal funds.

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that –

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or

of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section –

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or govern-

ment for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.